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Exhibit 13

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FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1977

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HEARINGS

BEFORE THE

SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

S. 1566

JUNE 13 AND 14, 1977

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Attorney General BELL. The working committee which worked on this particular legislation we are discussing today is now working on a charter. They just started within the last 2 weeks.

We are working on it, and Congressman Edwards is also working on it. Eventually the Senate Intelligence Select Committee will be working on it.

I am most anxious to get started on it. I don't want to leave the impression that we are dragging our feet.

Senator KENNEDY. When do you expect that we'd see that?

Attorney General BELL. If you'd put on a deadline, it would help me. If you were to say a month from now. If I haven't gotten something on it in a month, I may write it myself. [Laughter.]

Senator KENNEDY. Do you believe a charter would be important?

Attorney General BELL. It is most important. I would say it is the most important matter facing the Bureau.

Senator KENNEDY. What do you think, Director Kelley?

Director KELLEY. I agree completely. It's a very important thing.

Senator KENNEDY. Senator Thurmond?

Senator THURMOND. Mr. Attorney General, we are glad to have you with us. I want to commend you for the outstanding job you've been doing as Attorney General.

Attorney General BELL. Thank you, sir.

Senator THURMOND. Judge Bell, S. 1566 differs from last year's S. 3197—by eliminating an express reservation of the President's inherent powers to engage in electronic surveillance in matters outside the definition of electronic surveillance and, also, for matters that could not be reasonably said to have been within the contemplation of Congress.

Is it your position that even though this language is deleted from the bill, the inherent presidential power is preserved as interpreted by the courts?

Attorney General BELL. Yes. Because we can't change the Constitution.

But this is an accommodation between the legislative and executive branches of the Government where the President has agreed that he will follow the provisions of this statute in matters inside the United States.

I repeat: We can't change the Constitution by agreement.

Senator THURMOND. S. 3197—last year's bill—contained a unique provision which precluded this specially designated judge from looking behind the executive branch certification. This certification feature has been dropped from S. 1566.

Do you believe this change is procedurally sound in view of the responsibility of the executive branch to certify that the information sought is information necessary to the national defense or the conduct of the foreign affairs of the United States?

Attorney General BELL. I do.

This looking-behind process only applies in matters where American citizens are involved. We think the clearly erroneous standard is an adequate basis for proceeding. I'm not worried about that. I think it probably enhances the bill. You ought not to have the judge acting without some discretion in the matter.

So I am well-satisfied with that. That was the change we made.

Senator THURMOND. S. 1566, this year's bill, creates a special warrant for official foreign powers, which permits a warrant for 1 year and with less-sensitive information than would be required for a standard warrant directed against U.S. persons.

The question is: Do you feel that the more restrictive standards for U.S. persons is well justified?

Attorney General BELL. I do. I think that there is a rational basis for the distinction. You ought to have more strict standards where American citizens' rights are involved. We think that that is a reasonable approach.

Senator THURMOND. Director Kelley, under S. 1566 the minimization procedures required shall not preclude the retention and disclosure for law enforcement purposes of any information which constitutes evidence of a crime, if such evidence is to only be used in a criminal proceeding, with the advance authorization of the Attorney General.

Do you believe this standard is reasonable with regard to your responsibilities to enforce certain criminal laws?

Director KELLEY. I believe that it is reasonable.

Senator THURMOND. Director Kelley. As you know, the bill before us provides for two kinds of warrants—special warrants for foreign powers and standard warrants for U.S. citizens.

The standards for U.S. citizens are more restrictive than for foreign powers.

Do you see this difference as a problem to the effective electronic surveillance of U.S. persons engaging in activity threatening our national internal security?

Director KELLEY. I do not think that is a problem.

Senator THURMOND. That's all, Mr. Chairman.

Senator KENNEDY. Senator Hatch?

Senator HATCH. As I understand it, the bill provides for seven district judges designated by the Chief Justice of the Supreme Court of the United States to make these determinations.

First of all, is that enough judges?

Attorney General BELL. I think it is.

The reason I think it is a sufficient number is because I am handling all of them myself now, so if we get seven people doing what I do, that would be about right. [Laughter.]

Senator HATCH. I would have to agree with you.

Is there any loss of security in working with the seven judges? Do you anticipate any security leaks, and are there any provisions concerning the activities, actions, and approaches that the judges have to take?

Attorney General BELL. The most leakproof branch of the Government is the judiciary.

Senator HATCH. Or the most leaky.

Attorney General BELL. No. The courts have a great record in this area. I'm not worried about them. I have seen intelligence matters in the courts.

Although we don't have the seven designated judges, about the only problem is: Do they have safekeeping measures?

If we have seven judges, of course, we can arrange all that. It would be difficult to arrange it for 500 judges, but I think seven will work out.

I have great confidence in the courts. It might be because I used to be in the courts.

Senator HATCH. I do also.

Senator THURMOND. Mr. Chairman, I am on a conference for military procurement, so if you would excuse me I must leave.

Senator KENNEDY. We could keep you here and not get your vote on the B-1 bomber. [Laughter.]

Senator HATCH. I don't think anybody could keep him anywhere from having the B-1 bomber.

Senator KENNEDY. That's what I am afraid of. [Laughter.]

Senator HATCH. I'm concerned about whether this bill is inadequate in the sense that it might open an opportunity for third parties to come in; for instance, when denial is made and there is an appeal to the circuit to a special three-judge court of review and then to the Supreme Court. Is there any chance for third parties to come in and disclose the security nature of the surveillance procedures?

Attorney General BELL. It is ex parte.

It would be hard for a third party to get in.

Senator HATCH. My question is: Is this bill tightly enough drafted so that it will remain ex parte right up to the Supreme Court of the United States of America?

Attorney General BELL. We think so.

Senator HATCH. Would you advocate that it has to be?

Attorney General BELL. I think it has to be ex parte. I don't know of any other way to do it. You couldn't have a hearing with these backed up in papers for these sensitive warrant applications. I would have to just quit and withdraw the request.

Senator HATCH. So you don't anticipate this becoming anything but an ex parte proceeding without interference by special interest groups that may or may not like electronic surveillance?

Attorney General BELL. No. We couldn't function. It would compromise the system. I would have to say: No; we will back out and withdraw the request.

Senator HATCH. If we could have this procedure screwed up by people coming in anytime they want to question the procedure, I think you would have a very difficult time having any security with regard to the procedure. Isn't that correct?

Attorney General BELL. You would.

What we always have to have in mind is that we don't have any judicial protections now.

What this bill does is to afford the American people protection from the judicial system, but it will be ex parte.

Senator HATCH. Director Kelley, if you would like to comment on any of these matters, feel free to do so.

Director KELLEY. I will.

Senator HATCH. With regard to the 90-day provision, you indicated, Director Kelley, that you could live with that. Do you really feel that it is adequate, or do you feel that you need a more lengthy period of time in order to utilize the effectiveness of this particular statute?

Director KELLEY. In the case of the 90-day renewal need, of course, as is true now, we would come in and ask for a renewal. We have lived with it to date, and we could live with it in the future. We only thought from the time of the deliberations that a 1-year continuation or less, if indicated by the activities, that it might well be better to go 1 year.

It is a matter of just not having the necessity to go the four times as compared with one time in the 1 year.

But we can live with the 90-day provision if it is felt that this is the better system by you and the Department.

Senator HATCH. We are trying to find out what is the best system.

I think that the legislature should be concerned about what is the best, the most efficient, and the fairest system that we can possibly devise and still maintain the security of this country.

The way I am interpreting you, and correct me if I'm wrong, is you can live with the 90 days but you would certainly prefer it to be 1 year rather than have repeated returns to the court to get the very same thing you would need anyway.

Director KELLEY. Senator, I'm trying to abide by what is actually best for the country, plus the fact that we want to have clearly defined our intention to do that. If it be better understood as properly restrictive in a very sensitive area, we can go with the 90 and will.

As a matter of perhaps expediting or trying to have less of a burden in going through the continuations, we could go for 1 year. But I say we are in a crucial period; we are trying to do this in the best manner possible; 90 days would be my decision right now.

Senator HATCH. In other words, if the decision was 90 days, you could live with it, but you would prefer a year. How long does the average surveillance take? Is it less than 90 days or more than 90 days?

Attorney General BELL. Let me say something here.

The 1 year only applies to official foreign powers. The 90 days is to citizens.

Senator HATCH. Right.

Attorney General BELL. I'm hoping you will leave us with 1 year. I don't think it would be good to answer the question of how long an average surveillance goes on.

Senator HATCH. That's fair. I'll withdraw that question.

But would you, General, prefer 1 year also then?

The way I am interpreting both of you, it would be more expeditious and beneficial to national security to have 1 year in this particular case rather than 90 days.

Attorney General BELL. On foreign power.

Senator HATCH. Right.

Attorney General BELL. We don't ask for more than 90 days on individuals. We think they should be reviewed every 90 days.

Mr. ADAMS. Senator, the reason for that is that foreign intelligence gathering is a long-range proposition. This isn't something that starts one month and ends the next month.

When we are dealing with foreign powers and foreign establishments, we are dealing with historical trends that have taken place over many years.

You may not come up with something during the 90-day period or even a 6-month period.

So the reason for the 1-year, basically, is because of the long-range nature. By restricting it to a foreign power, as such, it was felt that